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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 229

ROLAND O. HAINES, ET AL., COMPRISING KEYSTONE POLICYHOLDERS' COMMITTEE,

Appellants,

vs.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 229

ROLAND O. HAINES, ET AL., Comprising Keystone Policyholders' Committee,

Appellants,

vs.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

STATEMENT UNDER RULE 12 (3) OPPOSING THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

I. Summary of Relevant Facts

On June 26, 1947, the Court of Common Pleas of Dauphin County, Pennsylvania, entered a final decree dissolving the Keystone Mutual Casualty Company, vacating its charter, ending its corporate existence and directing the Insurance Commissioner to liquidate its business and affairs under Sections 502-506 of the Insurance Department Act of May 17, 1921, P. L. 7891 (40 P. S. 202-206). The decree was en-

tered upon suggestion of the Attorney General acting at the relation of the Insurance Commissioner and established that the Company was insolvent and that its further transaction of business would be hazardous to its policyholders, its creditors and to the public (R. 1831a, 1833a).

Prior to the entry of the decree an audit of the Company's assets and liabilities disclosed that it had a deficit of approximately one and one-half million dollars instead of a surplus of approximately the same amount, as reported in its 1946 annual statement. (R. 1035a-1037a).

The principal officers and managing heads of the Company had examined the balance sheet of the auditors establishing its insolvency and had admitted that the figures were substantially correct (R. 897a, 949a, 984a, 1347a, 1348a). Moreover, independently of the audit, the said officers had admitted to the Insurance Commissioner that the Company was insolvent and that they had falsified the annual statement of the Company in a material respect for which act they were subsequently indicted and convicted of a criminal offense. (R. 751a, 825a).

Prior to the entry of the decree, the Secretary and managing head of the Company acknowledged that funds could not be raised to place the Company in a solvent condition (R. 895a). Further, the Company was represented by counsel at a hearing before the deputy Attorney General on June 25, 1947, at which time he reiterated the impossibility of raising the required funds but acknowledged that the Insurance Commissioner had extended every opportunity to the Company to accomplish this. (R. 1768a, 1769a).

The hearing held before the deputy Attorney General prior to the application for the decree of dissolution was pursuant to Section 502 of the Insurance Department Act and written notice of the said hearing was given to each director and principal officer on June 14, 1947. (R. 1759a, 1760a). The Board of Directors of the Company met on

June 24, 1947 at which time a resolution was adopted reciting the efforts of the Company to raise money and its inability to do so, directing that the Insurance Commissioner immediately take charge of the Company, accepting the resignations of all officers in order to facilitate a purchase or rehabilitation of the Company, and authorizing N. P. Kann, Secretary and attorney-in-fact, to join with the Insurance Commissioner "in any legal action necessary for the Insurance Commissioner to take charge of the Company". (R. 1761a, 1762a).

None of the officers or directors appeared at the hearing but the Company was represented by its general counsel who was present and did not object or protest when the deputy Attorney-General announced his intention of applying for an order of court liquidating the Company. (R. 1776a).

On June 26, 1947, the same attorney entered a general appearance for the Company in the legal proceedings instituted, joined in writing in the prayer of the Suggestion of the Attorney General, waived issuance of the rule and notice required under Section 504 of the Act and consented to the granting of the relief prayed for "to the extent of the authorization contained in the resolution of the Board of Directors—" (R. 1839a). Included in the very suggestion consented to was a prayer for liquidation of the Company. (R. 1958a).

From the date of the entry of the final decree on June 26, 1947 until December 18, 1950, the assets of the Company were being liquidated by the Insurance Commissioner during which time twenty-six States in which the Company did business were giving full faith and credit to the final decree and were turning over assets to the Pennsylvania Insurance Commissioner. Also, during this period of three and one-half years, many cases against assured of the Company had been settled, judgments against assureds

had been entered, many injured persons had waived their rights and thousands of claimants had abandoned claims. (R. 1732a, 1735a, 1747a).

No appeal was ever taken from the entry of this final decree. (Docket Entries, R. 19472) (Opinion of Court, R. 1701a). Until the appeal to the Supreme Court of Pennsylvania on the collateral issue of a mistake of fact approximately five years after the entry of the decree, no officer, director, policyholder or attorney complained of lack of notice or opportunity to be heard. No testimony was solicited at the hearings of the case from the officers or directors, although N. P. Kann, Secretary and manager, was an intervenor, and J. D. O'Neil, a Vice-President, was a member of an intervening committee, appellants here.

On December 18, 1950, a succeeding Attorney General and Insurance Commissioner filed a petition with the Dauphin County Court to vacate the Decree of June 26, 1947 averring that it was entered under a mistake of fact in that the Company was solvent as of that date, that the Company was still solvent and could be rehabilitated and that the vacation of the decree was sought for the purpose of effecting a rehabilitation of the Company. Nowhere in this petition is there any averment of lack of notice or an absence of due process of law in the entry of the decree. (R. 13a). Appellants, representing certain policyholders, joined in the prayer of the petition which was opposed by the Goldstein Committee, appellee here, and by others, representing claimants and creditors. (R. 191a).

A lengthy trial of the issues was held in the Dauphin County Court before Judge Neely, sitting as a jury, and in a comprehensive opinion containing findings of fact and conclusions of law dated March 17, 1952, joined in by the entire lower Court sitting en banc, the petition to vacate was dismissed (R. 1657a). Neither the present Attorney General nor the Insurance Commissioner, at whose instance

the petition to vacate was filed, appealed from the findings of the lower Court or from the order dismissing the petition. Appellants, however, appealed to the Supreme Court of Pennsylvania which affirmed the judgment of the lower Court.

II. Appeal Does Not Lie as the Method of Review

The validity of a state statute as being repugnant to the Constitution or laws of the United States was not drawn in question. Act of June 25, 1947, c. 646, 62 Stat. 929, 28 U. S. C. 1257 (2).

No appeal was taken from the entry of the final decree of liquidation and dissolution. The proceedings giving rise to this appeal were based upon a petition to vacate the decree on the equitable ground of a mistake of fact as to the insolvency of the Company and the corresponding answer denying the mistake of fact. (R. 12a, 13a). The petition did not even raise the question of lack of notice or lack of due process in the entry of the decree, much less the effect and requirements of Secs. 213, 321 and 501, 507, inclusive, of the Pennsylvania Insurance Department Act, the validity of which it is now contended, were drawn in question.

Under the law of Pennsylvania, the issue was determined by the pleadings. *Otto* v. *Western Saving Society*, 343 Pa. 615 (1942).

The question of lack of notice and lack of due process was raised for the first time at the oral argument before the lower Court en banc and it was raised by the deputy Attorney General who has not appealed. It was never raised by the appellants. Under the law of Pennsylvania, matters not properly raised in the Court below cannot be invoked on appeal, notwithstanding that they involve constitutional questions. *Montgomery County Bar Assn.* v. *Rinalducci*, 329 Pa. 296; *Middletown* v. *Pennsylvania Public Utility*

Commission, 143 Pa. Super. Ct. 444; *Phila. Assoc. L. S.* v. *Philadelphia*, 139 Pa. Super. Ct. 560.

In appellants' statement of the questions to be argued on appeal in the Supreme Court of Pennsylvania (required by the Rules of the Supreme Court of Pennsylvania) the only indirect reference to the subject matter is contained in question number five, as follows:

> "5. Did the decree of dissolution, entered on June 26, 1947, deprive the company and its policyholders of property without due process of law?"

The briefs filed by appellant in the Supreme Court of Pennsylvania make reference to the particular sections of the Insurance Department Act now alleged to have been drawn in question, but such briefs do not form part of the State Court record for the purpose of review by the Supreme Court of the United States. *Live Oak Water Users Assn.* v. *Railroad Commission of California*, 269 U. S. 354, 357-358, 46 S. Ct. 149, 70 L. Ed. 305.

The reference to "due process of law" in appellants' statement of questions number 5 was not directed explicitly to the requirements of the Constitution of the United States even by implication since a similar clause is contained in the Constitution of the Commonwealth of Pennsylvania, Article 1, Section 9.

There has not been the "explicit and timely insistence" in the State Courts that the Insurance Department Act as applied is repugnant to the Constitution of the United States which is essential to jurisdiction on appeal. *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U. S. 182, 65 S. Ct. 624, 89 L. Ed. 857.

Nor did the decision of the Supreme Court of Pennsylvania sustain the validity of the Insurance Department Act against an attack on federal grounds as required for jurisdiction on appeal. 28 U. S. C. 1257 (2).

The Opinion of the Supreme Court of Pennsylvania affirming the judgment of the lower Court makes no reference to the due processes clauses of the Federal Constitution, as distinguished from the due process clause of the State Constitution. It was unnecessary to do so since appellants had not been explicit in their statement of questions to be argued on appeal.

Further, appellants have never contended that the Insurance Department Act does not provide adequate notice and an opportunity to be heard. They contend that the Company and its policyholders were deprived of their property without due process of law because the respective notices and hearings allegedly *required* by Sections 213, 321 and 506 of the Act were not given to them. Appellants state (Page 9 of Statement as to Jurisdiction) that "notwithstanding the mandatory nature of these safeguards in the Insurance Department Act, the Court of Common Pleas decided against these contentions."

As far back as the oral argument before the lower Court sitting en banc., the deputy Attorney General stated in his brief: (Page 28)

> "The deficiencies in the present case are not at all attributable, however, to the statute, compliance with which would have satisfied the requirements of due process (National Auto Corp. v. Barford, supra at 313), but rather to a lack of adherence to the fundamental requirements of the statute itself."

The Supreme Court of Pennsylvania, therefore, was never asked to consider the constitutionality of these particular sections but rather whether the notices and hearings required were indeed given or waived.

The jurisdiction of the Supreme Court of the United States to review a judgment or decree of a State Court on appeal, as distinguished from certiorari, is not established by a mere showing that determination of the cause involves

consideration of a statute instead of expressly sustaining the validity of the statute against an attack on federal grounds. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 69 S. Ct. 606, 93 L. Ed. 741.

Where it is claimed that rights and immunities under the Federal Constitution prevent the application of the statute, rather than the point that the State Statute, if so applied, would be invalid because repugnant to the Federal Constitution, an adverse ruling of the State Court is a denial of a claim of Federal rights and immunities and not a ruling upon the validity of the statute itself. In such case, the remedy, if there be one at all, is by way of certiorari and not by way of appeal. *Wilson* v. *Cook*, 327 U. S. 474, 482; 66 S. Ct. 663, 90 L. Ed. 793; *Charleston Federal S & L Assn.* v. *Alderson*, *supra*; 37 Mich. L. Rev. 540.

III. There Is No Jurisdiction to Review Either by Way of Appeal or Certiorari

(1) The Decree of Dissolution Was Not Appealed

The original decree of June 26, 1947 was a final order and decree from which no appeal was taken. By a petition filed over three and one-half years later, appellants invoked the equitable power of the Court to vacate the decree because, it was alleged the Company was solvent both at the time of the entry of the decree and at the time of filing the petition and there appeared to be no valid reason why an attempt should not be made to rehabilitate the Company. The issue raised by the pleadings was purely factual.

Had the petitioner raised the issue of lack of notice or lack of due process in the entry of the decree as the basis for the petition to vacate, he would have been confronted with the fatal objection that the decree was not appealed to the Supreme Court of Pennsylvania within the required period of three months.

Appellants, having adopted the petition of the Attorney General, are in no better position than he would have been. What they are really endeavoring to accomplish indirectly is a review of the original decree which, not having been appealed, was not a judgment of the highest Court of the State of Pennsylvania as required by the Judicial Code. 28 U. S. C. 1257.

Not having appealed the original decree, the most that appellants could expect in the subsequent proceedings was that some consideration be given the allegation of lack of due process as one of a number of other factors to influence the exercise of the equitable powers of the Court. There is no right of appeal from the exercise of such powers except for gross abuse of discretion and this does not involve any Federal question.

(2) The Federal Question Was Not Properly Raised or Preserved in the State Courts

It has already been stated in more detail that the issue presented by the pleadings was limited to the question of a mistake of fact as to the insolvency of the Company and that under the law of Pennsylvania the issue is determined by the pleadings. *Otto* v. *Western Saving Fund Society, supra.*

It is well settled that the proper time to raise a Federal question is in the trial court whenever that is required by State practice and the Supreme Court of the United States will abide by such local practice. *Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291, 308, 23. Ct. 375, 47 L. Ed. 480; *Pennsylvania R. R. Co.* v. *Illinois Brick Co.*, 297 U. S. 447, 462-463, 56 S. Ct. 556, 80 L. Ed. 796.

Not only did the petition and answer fail to raise the issue of due process but all counsel acknowledged in open Court that the only issue involved was the fact of insolvency.

At the hearing on February 20, 1951, the deputy Attorney General requested leave of court to amend his petition in order to eliminate the necessity of filing a plan of rehabilitation "so that it would merely leave the issue as to insolvency or solvency . . ." (R. 124a). The request was granted at a further hearing on May 14, 1951, at which time the trial judge stated that the amendment was granted—

> "in the interest of having the issue clearly defined . . . namely, whether or not there was an insolvency and is now an insolvency of this company, and also, if so, whether or not the company should be delivered into the hands of the Insurance Commissioner . . ." (R. 200a).

In response, the deputy Attorney General acknowledged that the trial judge "stated as clearly as anyone could state what the issues were and are" (R. 201a).

At the same hearing, counsel for the appellants addressed the Court at length regarding the issues involved (R. 208a-210a). He mentioned nothing about lack of notice or lack of due process and clearly stated:

> "I think the record to be laid before us will show also that the company has never been insolvent . . . If it weren't for that, there would be nothing to fight over and no point in my clients fighting and no point in my being here. For that reason, I am glad to note that Mr. Stern and Mr. Saltzburg recognize that the issue is a solvency." (R. 210a).

At still a further hearing on June 18, 1951, the deputy Attorney General stated:

> ". . . Your Honor ruled on it . . . that the issue to be tried in this proceeding was limited to the question of whether or not at December 31, 1946 this company was solvent or insolvent, and whether or not it is now solvent . . . We have prepared our proofs on the basis of that issue. . . " (R. 220a).

Again he repeated that—

> "We will proceed, sir, on the theory and remain on that theory that this order to dissolve the corporation, to vacate its charter was entered on a mistake of fact." (R. 223a).

The concession of the parties bind them upon review by the Supreme Court of the United States. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 434-435, 27 S. Ct. 350, 51 L. Ed. 553; *De Jonge* v. *Oregon*, 229 U. S. 353, 358, 57 S. Ct. 255, 81 L. Ed. 278.

Because of the insufficiency of the evidence adduced by the appellants on the fact of insolvency, the alleged mistake of fact, equitable relief was denied. The appellants, who proceeded on the adequacy of notice and the validity of the Insurance Code during the trial of the issues, raised for the first time the issue of lack of due process at the oral argument before the lower Court en banc.

Under the law of Pennsylvania, matters not raised in the court below cannot be invoked on appeal even though they involve constitutional questions. *Montgomery County Bar Assn.* v. *Rinalducci*, and other cases cited, *supra*.

The briefs filed in the lower Court and in the Supreme Court of Pennsyvania cannot supply the deficiency in jurisdiction and do not even form part of the record for the purpose of review. *Live Oak Water Users Assn.* v. *Railroad Commission of Calif.*, *supra*.

In the appeal to the Supreme Court of Pennsylvania, appellant was limited to the issue of the solvency of the Company. Appellants' inclusion of extraneous matters in its statement of questions to be argued on appeal cannot correct the deficiency.

Assuming, arguendo, that appellant had the right to argue the question of due process on appeal, its assignment of error in this regard falls far short of the requirement that

there be an "explicit and timely insistence" upon the Federal question.

For reasons hereinbefore set forth, appellants' statement of questions to be argued on appeal before the Supreme Court of Pennsylvania (Question number 5) makes no reference to the particular statute or sections thereof which are alleged to be in issue; nor is it alleged whether the Federal or State Constitution is involved. This is fatal to jurisdiction. *Charleston Federal Savings and Loan Assn.* v. *Alderson, supra; Chapin* v. *Fye*, 179 U. S. 127, 130, 21 S. Ct. 71, 45 L. Ed. 119; *Gibbes* v. *Zimmerman*, 290 U. S. 326, 328, 54 S. Ct. 140, 78 L. Ed. 342; *Bowe* v. *Scott*, 233 U. S. 658, 664-665, 34 S. Ct. 769, 58 L. Ed. 1141.

The bald allegation that there has been a lack of "due process" is never sufficient. *Thomas* v. *Iowa*, 209 U. S. 258, 263, 28 S. Ct. 487, 52 L. Ed. 782.

Appellants' petition for reargument before the Supreme Court of Pennsylvania attempted, for the first time to cure the defect. Reargument was denied, but this decision can be supported by the non-federal reason that the issue had not been previously raised, especially where the federal question was not specifically decided upon the petition for reargument. *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.*, 228 U. S. 326, 333-334, 33 S. Ct. 510, 57 L. Ed. 857; *Forbes* v. *State Council of Virginia*, 216 U. S. 396, 399, 30 S. Ct. 295, 54 L. Ed. 534.

From the date of the decree until the argument before the lower Court, a period of over four years, no policyholder, creditor, officer or director claimed that there had been a failure of notice or opportunity to be heard. Constitutional rights must be rigidly protected and enforced, but persons seeking them must assert their rights in season and not to the prejudice of intervening rights.

Appellants contend (Page 21) of Statement As To Jurisdiction, that they did not sleep on their rights because a

committee of policyholders known as the Matlack Committee had previously intervened on June 2, 1948, and appellants succeeded the prior Committee "in a timely fashion to continue its challenge."

First, the intervention by the Matlack Committee, one year after the entry of the decree, cannot be said to be a timely intervention. Second, the Matlack Committee was permitted to intervene only to determine whether under the facts and the law a rehabilitation of the Company was possible. It did not allege any mistake of fact as to the insolvency of the Company at the time of the entry of the decree or any impropriety in the proceedings. It merely sought to determine whether the Company was still insolvent. This Committee was permitted to withdraw from the case upon its own petition which stated that solvency or insolvency as of the present date could not be proved and that the difficulties presented in a rehabilitation of the Company were virtually insurmountable. (R. 1974a).

When appellants sought leave to intervene, they stated that the purpose of their intervention was to seek a rehabilitation of the Company. At no time did they allege that the decree was entered without due process of law. Every aspect of the case points unequivocally to a waiver by appellants of any defect in the entry of the decree by reason of constitutional requirements.

(3) There Is No Present Case or Controversy

There is no jurisdiction to review cases on federal grounds where the question is moot, the controversy has been extinguished, the questions sought to be reviewed are wholly abstract or the happening of events has rendered it impossible for the Court to grant any effectual relief. *Little* v. *Bowers*, 134 U. S. 547, 556-557, 10 S. Ct. 620, 33 L. Ed. 1016; *Mine Safety Appliances* v. *Forrestal*, 326 U. S. 371, 372, n. 2, 66 S. Ct. 219, 90 L. Ed. 140; *Highland Farms*

Dairy v. *Agnew*, 300 U. S. 608, 614, 57 S. Ct. 549, 81 L. Ed. 835; *Mills* v. *Green*, 159 U. S. 651, 653, 16 S. Ct. 132, 40 L. Ed. 293.

Under Section 502-506 of the Pennsylvania Insurance Department Act, where an insurance company is insolvent or is in a hazardous condition, the Insurance Commissioner, through the Attorney General, may apply to the Court for an order to show cause why the Commissioner should not take possession of the company. The Court may then order the Insurance Commissioner to conduct the business or it may order liquidation.

Appellants have admitted throughout the proceedings that the Company should have remained in the hands of the Insurance Commissioner with a view toward rehabilitation, but it should not have been liquidated because it was not insolvent and the policyholders, officers and directors did not have adequate notice of the several hearings to prove this fact and resist the liquidation order.

At the intitial hearings, the deputy Attorney General stated:

> "502 is the possession section and only the possession section. However, when the matter got to the point of presentation to this Court, it was presented under section 506, which is the dissolution section. . . Assuming that the testimony offered will justify the conclusion that this company was solvent. . . then we are confronted with the consideration perhaps of modifying the decree that was entered by this Court in June of 1947, to meet the statutory requirements on this Section 502." (R. 203-205a).

Counsel for appellants then stated that he "concur(red) completely with Mr. Sterling's idea that the remedy here is that provided by Section 502 and not the drastic dissolution provided by Section 506."

If anyone was prejudiced by the failure to receive ade-

quate notice or an opportunity to be heard at the time of the original decree, they certainly had full opportunity at the lengthy hearings on the petition to vacate the decree. The findings of fact, affirmed by the Supreme Court of Pennsylvania, conclusively establish that petitioners did not meet their burden of proving the solvency of the Company at the time of the entry of the decree (R. 1687a).

Of equal importance, it was established that the Company was still insolvent at the very time the petition to vacate was filed (R. 1687a). It would be a vain and useless act to vacate the decree and place the Company in the hands of the Insurance Commissioner to conduct its business only to be met with a new petition for liquidation on the ground of insolvency.

Especially is this true where the Insurance Commissioner, who did not appeal from the decision of the lower Court, has advised the Supreme Court of Pennsylvania that he doubts whether a rehabilitation of the Company could now be consummated even if the Company were solvent and "he believes that compliance with (the) admonitions (of the Court below) is in the best interests of the public and of the company, its creditors and policyholders" (See Page 3, Opinion of Bell, J.).

(4) No Substantial Federal Question Is Presented

Appellants' contentions are based upon a strained construction of the Pennsylvania Insurance Code.

Section 502 provides that when an insurance company is *insolvent or in a hazardous condition* the Attorney General shall, after hearing, apply to the Court for an order to show cause why the Insurance Commissioner should not take possession, and conduct the business, *and for such other relief* as may be required.

Sections 505 and 506 then explain the two remedies to be followed where an application is made as provided for in

Section 502. Under Section 505, the Court shall authorize the Commissioner to conduct the business until it can be returned to the Company or, under Section 506 it may order liquidation of the Company.

Appellants contend that after the waiver of hearing by the Company under Section 502, there should have been another hearing granted under Section 506 before the order of liquidation was entered. This is not the construction placed upon these sections by the Pennsylvania Courts. Further, Section 502, of itself, authorizes the entry of a decree of dissolution since it provides for "such other relief as the nature of the case and the interest of its policyholders, creditors, stockholders, or the public may require."

That Sections 502 and 506, together, with the intervening Sections of 503, 504 and 505, are related steps of an integral whole governing the manner of handling an insurance company when its business can no longer be conducted safely with due regard for the public interest has been frequently asserted and established by the Supreme Court of Pennsylvania.

Commonwealth v. *Ministers Protective Society*, 294 Pa. 6, 10, 16 (1928).

In *Commonwealth, ex rel.* v. *Equitable Casualty & Surety Co.*, 306 Pa. 19 (1931):

> "The act requires that, when an insurance company becomes insolvent or otherwise contravenes Section 502, . . . the attorney general, . . . may apply . . . for an order directing such company to show cause why its business should not be wound up or closed."

In *Commonwealth ex rel.* v. *Penn General Casualty Co.*, 316 Pa. 1, 4 and 5 (1934), the Supreme Court of Pennsylvania said:

> "Pennsylvania has provided a most complete system for the regulation and liquidation of insolvent insur-

ance companies and the winding up of their affairs in 'The Insurance Department Act of 1921,' approved May 17, 1921, P. L. 789, 40 P. S., Section 1 and 'The Insurance Company Law of 1921,' approved May 17, 1921, P. L. 682, 40 P. S., Section 341. Speaking of the former act, we said in *Com. v. Equitable Casualty & Surety Co.*, 306 Pa. 19, that it is a comprehensive statute regulating the business of insurance in the Commonwealth."

The Supreme Court of the United States also recognized the integrity and the correlated Sections of 502, 503, 504, and 506 in connection with the liquidation of an insurance company.

In *Penn General Casualty Co.* v. *Commonwealth of Pennsylvania*, 294 U. S. 189 (1935) Justice Stone said:

"Section 502 of the Insurance Department Act authorizes the Commissioner to liquidate an insurance company when its condition is such that further transaction of its business will be hazardous; such liquidation is permitted only on an order or decree of the Court of Common Pleas, granted on application of the Attorney General of the state. Upon such application the Court is authorized by Section 505 to enjoin the company from transacting any business and from disposing of its property, and after a hearing to direct the Insurance Commissioner to take possession of the property and to liquidate it pursuant to the statute. By Sections 506, 507, the order of the court vests the Commissioner with the title to the property and supersedes the authority of any receiver appointed by any other state court."

It is suggested that the Federal question raised by the appellants is not only not substantial but the effort to raise it is based on a construction of the statutes which have not been accepted by the Supreme Court of Pennsylvania nor the Supreme Court of the United States.

The inconsequential substance of the complaint of lack of

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adequate notice is further manifested by the obvious attempt to assert that the notice to the company should have been supplanted by notice to the policyholders or creditors. This overlooks the very obvious point that the Insurance Code of Pennsylvania regulates Insurance Companies. Policyholders and creditors have derivative rights and liabilities by virtue of their relation to the company.

Pink v. *A A A Highway Express, Inc.*, 314 U. S. 201 (1941).

Policyholders are not entitled to a special notice under the statutes separate and apart from the notice to the insurance company. Surely it is not to be expected that approximately 105,000 policyholders were to receive notice and be given an opportunity to be heard while the assets were being dissipated. Due process has never meant that everyone who may be affected by a decree need have notice and be a party to every stage of the proceedings. The due process clause requiring notice and opportunity to be heard follows a rule of reason.

Union Trust of Pittsburgh case, 359 Pa. 363 (1948);

Pink v. *AAA Highway Express, Inc.*, 314 U. S. 201 (1941);

Anderson National Bank v. *Luckert*, 321 U. S. 233 (1944).

Notwithstanding that appellants recognized that the notice was adequate under Section 502 and that they relied on that section in the trial of the case, they now claim that no notice was given under Section 506. The appellants overlook the fact that the order or decree made under Section 506 is the normal and sequential result of the initiatory proceedings under Section 502.

Penn General Casualty Co. v. *Commonwealth of Pennsylvania*, 294 U. S. 189 (1935).

The fact that the decree of dissolution was entered without formal hearing did not deprive the company of due process. The hearing had already been held under Section 502 and the Company together with its officers and directors had received notice of the fact that the company could no longer do business in conformity to law as established by the Commonwealth and conceded by the company. Another hearing would have been a vain and repetitious thing. The important requirement of due process is not the hearing but the opportunity to be heard.

In the case of *Anderson National Bank* v. *Luckett*, 321 U. S. 233, Mr. Chief Justice Stone stated (p. 246):

> "The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the Constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled."

Appellants admit that the Company had no right to continue business because its reserves were below the statutory requirements, but they complain that under Section 321 of the Act (40 P. S. 131) it should have been given notice of an impairment of reserves and an opportunity to repair them.

It is obvious that Section 321 deals with companies that are not insolvent and that Sections 502-506 control where there is insolvency. Further, the Company, through its Board of Directors, had actual knowledge of the impairment and by resolution, conceded that it had made an effort to raise funds but was unable to do so. (R. 1761a-1762a).

Equally obvious is the requirement of Section 213 of the Act (40 P. S. 51). This section provides that an insurance company shall be granted a hearing before the filing of a report of an examination of its financial condition. This section can only apply to a solvent company engaged in

business. Moreover, the Company here was granted a full hearing before the deputy Attorney General prior to filing the particular report with the Court.

(5) The Decision Rests Upon Non-Federal Grounds Which Independently Support the Judgment

The Supreme Court of Pennsylvania, by its Opinion dated December 8, 1952, affirmed the judgment of the lower Court upon the following non-federal grounds which independently and adequately support the judgment.

(a) That the petition to vacate alleges the solvency of the Company at June 26, 1947 and at the date of filing of the petition and that petitioner did not meet the burden of proof required of him in this regard under the decisions of the Pennsylvania Courts.

(b) That the Company was in a precarious financial condition on June 26, 1947, its officers having admitted its insolvency; that its affairs were mismanaged, its records manipulated and its financial condition had been fradulently mis-represented by its officers.

(c) That the Company was insolvent as of the date of the filing of the petition to vacate.

(d) That the officers and directors waived all of the requirements of notice under the Insurance Code.

Nowhere in the findings of fact of the lower Court (R. 1672a-1694a) or its conclusions of law (R. 1748a-1753a), all of which were affirmed by the Supreme Court of Pennsylvania, is there any mention of due process of law. This for the reason that pleadings determined the issue. The case was therefore decided by the lower Court upon issues of fact involving non-federal grounds.

It is true that the lower Court, in its opinion, discussed the issue of notice and opportunity to be heard as required by the Insurance Code "bearing in mind that the essential issues raised in this petition to vacate pertain to the sol-

vency of this company". (R. 1736a). But such a discussion is not sufficient to confer federal jurisdiction. *Morrison* v. *Watson*, 154 U. S. 111, 115, 14 S. Ct. 995, 38 L. Ed. 927.

It has been repeatedly held that the Supreme Court of the United States is bound by the findings of fact of a state court, especially when concurred in by the state trial and appellate courts. *In re Buchanan*, 158 U. S. 31, 36, 15 S. Ct. 723, 39 L. Ed. 884; *King* v. *West Virginia*, 216 U. S. 92, 100, 30 S. Ct. 225, 54 L. Ed. 396; *Grayson* v. *Harris*, 267 U. S. 352, 357-358, 45 S. Ct. 317, 69 L. Ed. 652.

(e) The notice and opportunity to be heard provided for by the sections of the Insurance Code in question, as construed by the Pennsylvania Courts, relate only to the issue of solvency which is an issue of fact. Since the findings of fact establish the insolvency of the company, nothing prejudicial to any party occurred by reason of any lack of notice or opportunity to be heard.

The Supreme Court of the United States has no jurisdiction where the cause involves only the proper construction of a state statute. *Quong Ham Wah Co.* v. *Industrial Accident Commission of Calif.*, 255 U. S. 445, 448-449, 41 S. Ct. 373, 65 L. Ed. 723.

(f) That in deciding there was no failure of due process in the entry of the decree, the Court did not uphold the validity of the decree against an attack on federal grounds but discussed "due process" generally. This was made necessary by appellants' failure to be explicit in their statement of questions to be argued on appeal. (See discussion III (2) *supra.*)

It is well settled that there is no federal jurisdiction where the decision of the State Court rests upon one or more grounds which independently and adequately support the judgment or decree.

> "If the same judgment would be rendered by the State Court after we correct its views of federal laws,

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our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn,* 324 U. S. 117, 125, 126, 65 S. Ct. 459, 89 L. Ed. 789.

WHEREFORE, the appellees move that the above appeal be dismissed and the judgment of the Supreme Court of Pennsylvania be affirmed.

Respectfully submitted.

D. ARTHUR MAGAZINER,
MAURICE STERN,
DAVID A. SALTZBURG,
JOSEF JAFFE,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 229

ROLAND O. HAINES, ET AL., COMPRISING KEYSTONE POLICYHOLDERS' COMMITTEE,

Appellants,

vs.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MOTION TO DISMISS APPEAL ON GROUNDS OF JURIRDICTION UNDER RULE 12 (3)

To the Honorable, the Supreme Court of the United States:

William Goldstein, et al., intervenors, one of the appellees, for convenience referred to as the Goldstein Committee, through its attorneys, Maurice Stern, Esquire, of Mayer, Magaziner and Brunswick, David A. Saltzburg, Esquire, of Kolander and Saltzburg, and Josef Jaffe, Esquire, respectfully move that the above appeal be dismissed by

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reason of the matters and grounds making against the jurisdiction of your Honorable Court set forth in the annexed statement, and that the judgment of the Supreme Court of Pennsylvania be affirmed.

D. Arthur Magaziner,
Maurice Stern,
David A. Saltzburg,
Josef Jaffe,
Counsel for Appellees.